83 - 1407

NO. _____

In The
Supreme Court of the United States
October Term, 1983

JOHN LANGUIRAND,
Petitioner,

versus

CITY OF PASS CHRISTIAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ~~MISSISSIPPI SUPREME COURT~~ U.S. Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does 42 U.S.C. § 1983 require proof that the entire "police force" be inadequately skilled or experienced in order to make out a *prima facie* case where it is uncontroverted that the actions of the city showed a policy of not requiring weapons training prior to allowing a police officer to carry a deadly weapon?

2. Does the opinion below of the Court of Appeals for the Fifth Circuit create a conflict which this Court should resolve as between the Second, Fifth, Sixth, Eighth and Tenth Circuits, all as measured as against the backdrop of *Monell v. Social Services of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), overruling *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). See *Owens v. Haas*, 401 F.2d 1242, 1246-47 (2d Cir. 1979) *cert. den.*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979); *Hayes v. Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir.) *cert. den.*, — U.S. —, 103 S.Ct. 75, 74 L.Ed.2d 73 (1982), where two Circuits hold that single incidents without proof of a general failure to train are sufficient to state the cause of action, and constitute the proper standard of proof. Cf. *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981) and *McClellan v. Facteau*, 610 F.2d 693, 697 (10th Cir. 1979), where the Plaintiff's Fourth Amendment right to be secure in his person against unwarranted use of police's excessive force constitutes the constitutional deprivation complained of in the cause of action only where the city has "prior notice".

PARTIES TO THE PROCEEDINGS

1. John Languirand,
2. City of Pass Christian, Mississippi,
3. John Hayden (dismissed by jury vedict).

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STATUTES:

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PETITION FOR WRIT OF CERTIORARI

John Languirand respectfully petitions for a Writ of Certiorari to review the opinion of the United States Court of Appeals appeal to the Fifth Circuit rendered on October 17, 1983.

VERDICT AND OPINION BELOW

The verdict of the Jury in the United States District Court for the Southern District of Mississippi as appended

hereto is the "judgment". The opinion of the Court of Appeals is appended hereto styled. *"Languirand vs. Hayden, an individual, v. City of Pass Christian"*, etc., 717 F.2d 220 (5th Cir., Oct. 17, 1983).

JURISDICTION

This petition is filed in a timely manner pursuant to Rule 20 of the United States Supreme Court; jurisdiction is based on Title 28 USCA §1254.

QUESTIONS PRESENTED FOR REVIEW

1. Does 42 USC § 1983 require proof that the entire "police force" be inadequately skilled or experienced in order to make out a *prima facie* case where it is uncontroverted that the actions of the city showed a policy of not requiring weapons training prior to allowing a police officer to carry a deadly weapon?

2. Does the opinion below of the Court of Appeals for the Fifth Circuit create a conflict which this Court should resolve as between the Second, Fifth, Sixth, Eighth and Tenth Circuits, all as measured as against the backdrop of *Monell v. Social Services of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), overruling *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). See *Owens v. Haas*, 401 F.2d 1242, 1246-47 (2d Cir.) *cert. den.*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d

407 (1979); *Hayes v. Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir.) *cert. den.*, — U.S. —, 103 S.Ct. 75, 74 L.Ed. 2d 73 (1982), where two Circuits hold that single incidents without proof of a general failure to train are sufficient to state the cause of action, and constitute the proper standard of proof. Cf. *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981) and *McClellan v. Facteau*, 610 F.2d 693, 697 (10th Cir. 1979), where the Plaintiff's Fourth Amendment right to be secure in his person against unwarranted use of police's excessive force constitutes the constitutional deprivation complained of in the cause of action only where the city has "prior notice".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution, Amendment IV

> The Right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated.

U. S. Constitution, Amendment XIV

> . . . Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection under the laws.

Title 42, USC §1983

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or

Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

The jury, in a general verdict without any special issues or interrogatories, found for Hayden and against the city for One Million, Five Hundred Thousand ($1,500,000.00) Dollars. The Petitioner filed suit under 42 USC §1983, the Fourth and Fourteenth Amendments to the United States Constitution on May 29, 1979, and the jury returned its verdict on February 11, 1981. The Court of Appeals reversed on October 17, 1983, *reh. en banc den.*, — F.2d —, Nov. 30, 1983. Languirand sued the police officer and the city under the theory that the City inadequately trained, particularly in the use of his pistol, John Hayden, and alleged the shooting of the Petitioner was a "proximate result of the alleged policy or custom of the City of Pass Christian of placing armed officers on the streets without adequate training in the use of weapons and firearms". The jury charge required that the City be found grossly negligent in order for a verdict to be rendered against it, but as the Fifth Circuit stated:

. . . but did not submit any good faith defense with respect to the City.[1]

REASONS FOR GRANTING THE WRIT

I.

(A) SPECIES OF PROOF REQUIRED

It is respectfully submitted that the Fifth Circuit Court of Appeals, in defining the issue as "sufficiency of evidence" to support the "species of tort liability" set in force by *Monell, supra,* is simply not correct in view of the discussion which follows.

The Court of Appeals held that the "police chief" and/or the "police force" was not shown to have been completely inadequately trained. What is the "species" in view of this Court's holding in requiring application of modern tort law?[2] This simply appears to be a "way out" of defining the reason for exonerating the city, placing responsibility for constitutional policy on police departments, and not requiring the enforcement of the jury mandate that the city pay the compensatory damages in the sum of $1,500,000.00. The Court of Appeals therefore did not face the Petitioner's cross appeal for interest, penal-

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1. We refer to the trial court's charge not for the purpose of expressing our approval or disapproval of it . . . fn(4) 717 F.2d 223.

2. *Smith v. Wade, 75 L.Ed.2d* 632, — U.S. —, — S.Ct. —, (April 20, 1983).

ties, and supersedeas bond, resting on the theory that the city is "a person" under *Monell, supra.* Mississippi cases and statutes place the city beyond the reach of interest and penalties on the issues of cross appeal since the city is under such law not "a person". This question was not reached by the Fifth Circuit Court of Appeals.

The Court of Appeals erroneously, under *Respondeat Superior,* put the police force "on trial" in its opinion, and since there were four to seven policemen (appearing in the record) employed by the City of Pass Christian during the time of the shooting of the Petitioner (R.281), three to six of whom had been to the Jackson, Mississippi, Police Academy for a short period of training, including weapons training (R.281), while Hayden had not, this constitutes 17.25% to 25% of the police force (R.281). The city had employed a Civil Service Commission to which it had apparently delegated the responsibility of the use of deadly force by the police force (R.284) with no guidelines which is an *Ultra Vires* delegation of power. Remembering that the ordinary rules of tort law should be applied, the cases are legion in Mississippi holding that "foreseeability of the natural consequences of a person's act" are part and parcel of the standard of proof required of the plaintiff.[3]

The City of Pass Christian, as composed of the Mayor and the Board of Aldermen on December 2, 1974, knew or should have known and should have reasonably foreseen that placing a deadly weapon, i.e., .357 Magnum Mississippi Highway Patrol police revolver (R.16,

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3. *Kirkland v. Harrison,* 221 Miss. 714, 74 So.2d 820 (Miss. 1954); *Marshall Durbin, Inc. v. Tew,* 362 So.2d 601 (Miss. 1978); *Horne v. Moorhead,* 228 So.2d 369 (Miss. 1969).

17) in the hands of a rookie, untrained policeman, who was twenty-one (21) years old at the time and who had just been recently promoted from "dispatcher" (R.15) would most probably lead to the very consequences which caused the grievous injuries to be suffered by the petitioner here.

The Court of Appeals did not note that Mayor Steve Saucier, who was mayor of Pass Christian, Mississippi, on December 2, 1974, stated that the city had no policy with regard to the training of its policemen, much less weapons training (R.82, 83). The city created a "Civil Service Commission" which hired Hayden (R.282). How could it be said that the city's policy or custom (none here) was not the proximate cause of the injury here, as did the Court of Appeals in focusing instead on the police chief's "negligence".

Plaintiff produced evidence required by *Monell, supra; Owens v. Haas*, 601 F.2d 1242 (2d Cir.) *cert. den.*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979); *Leite v. City of Providence, R.I.*, 463 F.Supp. 585, 590-91 (D.R.I.) (1978); *Rizzo v. Goode*, 523 U.S. 362, 96 S.Ct. 598, 56 L.Ed.2d 561 (1976); *Wagner v. Bonner*, 621 F.2d 675 (5th Cir. 1980) at the time that the case was tried. The Magistrate who tried the case held the plaintiff to a burden of proof commensurate with that later announced in *Owen v. City of Independence*, which was that "deliberate indifference" and gross negligence must be shown in order to recover compensatory damages only, and he accorded a good faith defense to John Hayden, the individual police officer, in accordance with *Newport v. Fact Concerts, Inc., supra* (1981), and *Owen, supra*. *Newport, supra* had not even been decided at the

time of the trial in January of 1981, refusing to allow punitive damages, thereby anticipating *Newport, supra.*[4]

The more "restrictive view" expressed in *Berry v. McLemore,* 670 F.2d 30 (5th Cir. 1982) and the opinion below can not and should not be allowed to stand in view of the divergence in the circuits and the clear language of the controlling U. S. Supreme Court cases cited above. As was said in *Smith v. Wade, supra:*

> The remaining question is whether the policies and purposes of § 1983 itself require a departure from the rules of tort common law. As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action. Smith offers us no persuasive reason to the contrary. 75 L.Ed.2d 632, 646

(B) THE CONFLICT IN THE SECOND, FIFTH, SIXTH, EIGHTH AND TENTH CIRCUITS

In *Owens v. Haas,* 401 F.2d 1242 (2nd Cir. 1979) *cert. den.,* 444 U.S. 980, 100 S.Ct. 483, 6 L.Ed.2d 407 (1979), the Court observed as follows:

> The District Court was correct in noting that a mere failure by the county to supervise its employees would not be sufficient to hold it liable under §1983.

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4. *Monell v. Dept. of Social Services of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018 (1978), 56 L.Ed.2d 611; *Owen v. City of Independence,* 445 U.S. 622 (1980), 100 S.Ct. 1398 1980), 63 L.Ed.2d 673 (1980); *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed2d 616 (1981).

Rizzo v. Goode, 523 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). However, the county could be held liable if the failure to supervise or the lack of a proper training program was so severe as to reach the level of gross negligence or "deliberate" indifference to the deprivation of the plaintiff's constitutional rights. *Leite v. City of Providence, R.I.*, 463 F. Supp. 585, 590-91 (D.R.I. 1978) See also *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1081-82 (3rd Cir. 1976). This concept of "deliberate indifference" does not hold the county at fault for the actions of its employees on a respondeat superior basis; it holds the county liable for its own actions which result in deprivation of constitutional rights. See *Turpin v. Mailet*, 579 F.2d 152, 164-65 n. 37 (2d Cir. 1978) *vacated* 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 646, *modified* 591 F.2d 426 (2d Cir. 1979); *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978) *cert. den.*, 439 U.S. 927, 99 S.Ct. 312, 58 L.Ed.2d 320 (1978).

The Court of Appeals for the Second Circuit has amplified the contours of this particular species of liability more adequately as follows:

> Although a city can not be held liable for simple negligent training of its police force, the city's citizens do not have to endure a "pattern" of past police misconduct before they can sue the city under § 1983. *Owens v. Haas (supra)* at 401 F.2d 1242, 1246.

The Court of Appeals for the Fifth Circuit carefully did not mention the language which immediately follows the foregoing language at 401 F.2d 1246 appearing in *Owens v. Haas:*

> A municipality is fairly considered to have actual or imputed knowledge of the almost inevitable consequences that arise from a ***non-existent*** or grossly inadequate training and supervising of a police force. (Emp. ours)

With regard to the split of authority, the Court of Appeals below noted:

> We will attempt a review of the numerous decisions in the Circuits touching on these points. As might well be expected, they are not entirely harmonious. Some of these decisions, while allowing §1983 recovery against a municipality for failure to properly train and discipline the police officers, nevertheless, apparently require that this be an essentially systematic failure resulting in a pattern of police misconduct. See *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981). See also, *McClellan v. Facteau*, 610 F.2d 693, 697 (10th Cir. 1979) ("must show that the defendant was adequately put on notice of prior misbehavior"). Such a requirement would appear to be consistent with the general rule as to the requirement of proof of custom or policy. See *Powe v. City of Chicago*, 664 F.2d 639, 649-52 (7th Cir. 1981).

The facts of the case here show that the jury found that the actions of the Mayor and Board of Aldermen of the City of Pass Christian, Mississippi, were so grossly negligent in failing to see the inevitable consequences of the use of a deadly weapon by an untrained police officer as to amount to a "reckless indifference" with regard to the plaintiff's Fourth Amendment rights. This is a simply stated cause of action over which the Court should not struggle in order to reach a just and equitable result for the petitioner here.

CONCLUSION

It is concluded that while some causal link must be made between the municipality's failure to train and the violation of constitutional rights, a single incident such

as placing a twenty-one (21) year old, untrained police officer with a deadly weapon on the streets of a municipality where the city had no policy or custom of requiring any minimum standards of training for such officers, this is sufficient to suggest that link, and if the same is a question for the jury as governed by the principles of *Smith v. Wade, supra,* under the ordinary tort law of the State of Mississippi where the accident in question occurred, the jury resolution should stand, petitioner's writ should be granted, and the Court of Appeals should be reversed.

II.

SPLIT IN THE CIRCUITS

There is a split of authority in the five circuits with regard to the standard of proof for sufficiency of the evidence for compensatory damages under 42 USC §1983 under *Monell.* In the case *sub judice,* the Court of Appeals remarked that it reached only one issue: "Whether the evidence established the *requisite* custom (Emp. ours) or policy for which a city can be held liable. . ." 717 F.2d 220, 223. Further, the Court of Appeals indicated that, "Our research discloses no decision of the Supreme Court which has made any holding or given any authoritative direction, on the issue of liability under §1983 of a governmental unit for injuries resulting from lack of adequate training of its personnel." Ibid. 717 F.2d 220, 225.

The Court of Appeals went on to hold:

> . . . Some courts interpreting *Monell* have held a municipal policy of authorizing or encouraging police misconduct can be inferred where the municipality has been grossly negligent in the hiring, training or

disciplining of its police force. *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981); *Owens v. Haas*, 401 F.2d 1242, 1246-47 (2d Cir.) *cert. den.*, (444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407) (1979); *Popow v. City of Margate*, 476 F.Supp. 1237, 1245-46 (D.N.J. 1979); *Leite v. City of Providence*, 463 F.Supp. 585, 590-91 (D.R.I. 1978); see also *Reeves v. City of Jackson*, 608 F.2d 644, 652 (5th Cir. 1979) (dictum) Id. at 32-33. (Emp. ours.)

We described that interpretation as 'this most expansive view of *Monell*' and expressly decline(d) to rule on whether this interpretation of *Monell* is proper. (Id. at 33 and n. 1).

In a case not discussed in the Court of Appeals, *Smith v. Wade*, — U.S. —, 75 L.Ed.2d 632, — S.Ct. —, April 20, 1983) the Supreme Court indicated some guidance with regard to the standard of proof required for compensatory damages by way of dicta, even though it did not have before it the issue of "adequacy of the evidence to support the verdict of liability for compensatory damages". 75 L.Ed.2d 632, 637. Mr. Justice Brennan observed that:

"In the absence of more specific guidance, we look first to the common law of torts (both modern and as of 1871) with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute. *Carey v. Piphus*, 435 U.S. 247, 253-264, 555 L.Ed.2d 252, 98 S.Ct. 1042. We have done the same in other context arising under 1983, especially the recurring problem of common law immunities." (cit. om.)[5]

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5. Mississippi has abolished the sovereign immunity doctrine, as of July, 1984, in *Pruett v. City of Rosedale*, 421 So.2d 1046 (1982) in a "prospective only" holding. The Mississippi six year statute of limitation began on Dec. 2, 1974, and Pruett was decided in November, 1982, after oral argument of the case on June 22, 1982, in the Court of Appeals here. The sovereign immunity kept petitioner from suing except under 42 U.S.C. § 1983.

This Court observed in pertinent part:

> The remaining question is whether the policies and purposes of §1983 require departure from the rules of tort common law. As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action. *Smith* offers no persuasive reason to the contrary. *Smith v. Wade,* Id. 75. L.Ed.2d at 646.

More particularly, the Court noted:

> . . . Smith seems to assume that prison guards and other state officials look mainly to the standard of punitive damages in shaping their conduct. We question the premise; we assume, and hope, that most officials are guided primarily by the underlying of federal substantive law—both out of devotion to duty and in the interest of *avoiding liability for compensatory damages.* (Emp. ours.) At any rate, the conscientious officer who desires clear guidance on how to do his job and avoid lawsuits can and should look to the standard for actionability in the first instance." Id. at 648.

This Court in its analysis of *Smith v. Wade, supra,* was concerned with:

> The focus is on the character of the tort feasor conduct—whether it is of the sort that calls for deterrance and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages; and that assessment does not become less appropriate simply because *the plaintiff in a case faces a more demanding standard of actionability.* (Emp. ours.) To put it differently, society has an interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for

lesser degrees of fault. (cit. om.) 75 L.Ed.2d 632 at 650.

Petitioner was held to a standard of "deliberate indifference" in the jury instruction.[6]

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6. You are instructed that the City of Pass Christian, Mississippi, was a municipal corporation duly and legally chartered by the State of Mississippi as such, and that it was a municipal corporation and political subdivision of the State of Mississippi on December 2nd, 1974, and further that since a corporation can act only through its officers, or employees, or other agents, the burden is on the plaintiff to establish, by a preponderance of the evidence in this case, that the policy or custom of placing police officers on duty in the City of Pass Christian who were inexperienced and unqualified to act as a police officer using a deadly weapon, if you so find from a preponderance of the evidence in this case, and that such policy or custom constituted a deliberate indifference toward the rights of the plaintiff, and further that said policy or custom proximately caused or contributed to any injuries and consequential damages suffered by the plaintiff, if any of you so find from a preponderance of the evidence, then, in that event, any such actions of any officers, employee, or other agent of said municipal corporation in the performance of his or her duties is held in law to be the act or omission of the municipal corporation.

In that regard I instruct you that the City of Pass Christian cannot be held liable for simply negligent training of its police force. It can only be held liable if it fails to train its officers or trains its police officers in a grossly negligent manner. Oversights in the training process or simple negligence in some of the training procedures will not give rise to liability; instead, the training must be non-existent, or reckless or grossly negligent. There is a clear and significant difference between negligence and gross negligence. Negligence requires only a showing of unreasonableness while gross negligence demands evidence or near recklessness or deliberate indifference or completely unjustified and unreasonable action. The failure to train law enforcement officers must be so grossly negligent as to constitute deliberate indifference in order to hold the city liable. The plaintiff must prove from a preponderance of the evidence that

(Continued on following page)

CONCLUSION

Since there is a split in the Circuits, and since the petitioner here was held to a standard of deliberate indifference instead of gross negligence, and since *Smith v. Wade, supra,* indicates that the common law rule of the

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(Continued from previous page)

the defendant, City of Pass Christian, was guilty of gross negligence which proximately caused or proximately contributed to cause the incident in question. If you find that the City of Pass Christian was not grossly negligent in the training of its officers, then your verdict must be for the defendant, the City of Pass Christian.

You are instructed that an injury or damage is proximately caused by an act or failure to act if it appears from a preponderance of the evidence in the case that the act on the part of the city's officers, employees or agents played a substantial part in bringing about or actually causing the injury or damage complained of, and that the injury or damage complained of was either proximately caused or contributed to or was a reasonably probable consequence of the act on the part of the officers, employees or agents of the municipal corporation, the City of Pass Christian, Mississippi.

You are instructed according to the laws of the State of Mississippi that the governing authority of the City of Pass Christian on December 2nd, 1974, had the power and the authority, in its discretion, to pay the expenses of any municipal peace or police officer which said officer would incur in attending any recognized training school for police and law enforcement officers. The City of Pass Christian was further authorized and empowered under the law on said date to pay the salary of such municipal peace and police officers during the time when such officers were attending such training schools; and further that the City of Pass Christian had the authority and power to pay such expenses in its discretion to any other municipal officer or employee to attend any recognized training school beneficial to his particular employment.

state where the "constitutional tort" occurs under § 1983 should be looked to for guidance, it is submitted respectfully that the tort law of the State of Mississippi with regard to foreseeability would dictate a result consistent with the actions of the District Court. The trial judge allowed the jury to decide whether a complete lack of foreseeability of allowing the use of deadly force by a twenty-one (21) year old untrained policeman constitutes a "reckless indifference" towards the rights of the citizen (plaintiff) under the Fourth Amendment and Fourteenth Amendment to the United States Constitution with regard to a complete lack of reasonable foreseeability. The jury should decide whether this conduct constituted the requisite "reckless indifference".

The Fifth Circuit Court of Appeals would not agree with the Sixth and Second Circuits and would not have a single incident give rise to the cause of action as contemplated by *Monell, supra.*

This petition gives this Court ample opportunity to define the "lowest common denominator" of the cause of action with regard to a single incident, and to specifically settle the conflict as between the five (3-2) Circuits with regard to the sufficiency and species of evidence (or "species") where the plaintiff does not seek to prove that the entire police force or the majority of the police force of the entire city is not properly trained.

The District Court properly instructed the jury in a manner consistent with the standards of *Monell, supra.*[7] The Court of Appeals focused on the conduct of the police chief. This does not correctly interpret *Monell.* The pol-

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7. See jury instructions—fn.[6] *(supra)*

icy or custom of the City regarding deadly force under the Police Power cannot be delegated with impunity where a reasonably foreseeable catastrophy lies in wait. Mississippi towns have long known the standard of care in using firearms. *Jackson v. Martin* (N.D. Miss.), 261 F. Supp. 902 (1962). This delegation, if any, would be *Ultra Vires.*

The Fifth Circuit has recognized the Fourth Amendment's applicability to shooting cases. *Wagner v. Bonner,* 621 F.2d 675 (5th Cir. 1980). Therefore, this petition should be granted and certiorari should be granted, and the Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED this the 8 day of February, 1984.

JOHN LANGUIRAND

By: /s/ NORMAN BRELAND
His Attorney

By: _____
WALTER J. GEX, III
His Attorney

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CERTIFICATE

I, NORMAN BRELAND, of counsel for the Petitioner, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari to the Mississippi Supreme Court on Counsel for Respondent, by depositing same in the United States Mail, postage prepaid on the 8 day of February, 1984, to Honorable George M. Morse, White & Morse, Attorneys, at Post Office Drawer 100, Gulfport, Mississippi 39502.

Dated this the 8 day of February, 1984.

By: /s/ NORMAN BRELAND

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUHERN DIVISION

CIVIL ACTION NO. S79-0197(C)

JOHN LANGUIRAND,

Plaintiff,

VERSUS

JOHN HAYDEN, an individual, and THE CITY OF PASS CHRISTIAN, an incorporated political subdivision of the State of Mississippi

Defendants.

JUDGMENT

(Filed June 23, 1981)

This cause having come on for trial on its merits on Monday, February 9, 1981, before this Court, the Honorable John M. Roper, United States Magistrate presiding, and all parties having appeared with their respective attorneys and having announced ready for trial, and having consented to said trial before said Magistrate, the Court then did empanel a jury of twelve good and lawful citizens being duly qualified, sworn and empaneled, did hear the testimony of all the witnesses and consider the evidence and the arguments of counsel, and did receive instructions of the Court and retired to consider its verdict on Wednesday, February 11, 1981, and the jury did presently return into open Court the following verdict, to-wit:

"WE, THE JURY, FIND FOR THE PLAINTIFF (JOHN LANGUIRAND) AND ASSESS HIS DAMAGES

AT ONE MILLION FIVE HUNDRED THOUSAND DOLLARS, as the verdict of the jury."

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Plaintiff, JOHN LANGUIRAND, does recover and have of the Defendant, CITY OF PASS CHRISTIAN, MISSISSIPPI, the sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS, and that all costs of this action are assessed to the Defendant, CITY OF PASS CHRISTIAN, MISSISSIPPI, for which proper process may issue.

Pursuant to the opinion of this Court dated June 17, 1981, no interest may be assessed against the Defendant, CITY OF PASS CHRISTIAN, MISSISSIPPI.

ORDERED AND ADJUDGED this 23rd day of June, 1981.

/s/ JOHN M. ROPER
UNITED STATES MAGISTRATE

John LANGUIRAND, Plaintiff-Appellee
Cross-Appellant,

v.

John HAYDEN, An Individual,
Defendant,

City of Pass Christian, Etc., Defendant-Appellant
Cross-Appellee.

No. 81-4329.

United States Court of Appeals,
Fifth Circuit.

Oct. 17, 1983.

City appealed from a judgment of the United States District Court for the Southern District of Mississippi, John M. Roper, Magistrate, which held it liable under section 1983 for severe injuries sustained by plaintiff as result of a shooting by a patrolman. The Court of Appeals, Garwood, Circuit Judge, held that although there was evidence from which jury could reasonably conclude that patrolman was grossly negligent in causing severe permanent injuries to plaintiff and that city police chief was grossly negligent in sending patrolman on patrol without additional training, city could not be held liable for plaintiff's injuries under section 1983 where there was no evidence that city police force in general was inadequately skilled or experienced, that there had been other actual or claimed incidents of police misconduct or negligence, that city had any general policy or custom of sending unskilled or inexperienced officers on patrol or that members of city's governing body were themselves grossly

negligent in failing to prevent patrolman's going on patrol without additional training.

Reversed.

Goldberg, Circuit Judge, concurred specially.

1. *Civil Rights* 13.7

City can be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels. 42 U.S.C.A. § 1983.

2. *Civil Rights* 13.7

A local government may not be sued under section 1983 for an injury inflicted solely by its employees or agents; instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983. 42 U.S.C.A. § 1983.

3. *Civil Rights* 13.7

Municipality may be liable under section 1983 for intentional conduct of its governing body, and no such conduct is an ad hoc, isolated, individual action not taken pursuant to any overall municipal custom or policy. 42 U.S.C.A. § 1983.

4. *Civil Rights* 13.7

If there is a cause of action under section 1983 against a municipality for failure to properly train a police of-

ficer whose negligent or grossly negligent performance of duty has injured a citizen, such failure to train must constitute gross negligence amounting to conscious indifference, and a municipality is not liable under section 1983 for negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train particular officer in question, in absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force. 42 U.S.C.A. § 1983.

5. *Civil Rights* 13.13(3)

Although there was evidence from which jury could reasonably conclude that patrolman was grossly negligent in causing severe permanent injuries to plaintiff and that city police chief was grossly negligent in sending patrolman on patrol without additional training, city could not be held liable for plaintiff's injuries under section 1983 where there was no evidence that city police force in general was inadequately skilled or experienced, that there had been other actual or claimed incidents of police misconduct or negligence, that city had any general policy or custom of sending unskilled or inexperienced officers on patrol or that members of city's governing body were themselves grossly negligent in failing to prevent patrolman's going on patrol without additional training. 42 U.S.C.A. § 1983.

Lee N. Perry, George E. Morse, Frank P. Wittmann, III, Gulfport, Miss., for defendant-appellant cross-appellee.

Norman Breland, Gulfport, Miss., Walter J. Gex, III, Bay St. Louis, Miss., for plaintiff-appellee cross-appellant.

Appeals from the United States District Court for the Southern District of Mississippi.

Before GOLDBERG, WILLIAMS and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

In this case we venture into the labyrinth of municipal liability under 42 U.S.C.A. § 1983.[1] Conscious of the grievous injury suffered by the plaintiff-appellee, we nevertheless reverse because the evidence fails to establish such a custom or policy of the City defendant as required for municipal liability under section 1983.

THE INCIDENT

On the evening of December 2, 1974, plaintiff John Languirand and his friends, Kim Merritt and Rickey Foley, drove from Bay St. Louis to Pass Christian, Mississippi. They were just "driving around." They stopped at a convenience store to buy some beer. Eventually, Fo-

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1. 42 U.S.C.A. § 1983 provides in part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

ley requested they stop again so he could relieve himself. Languirand turned onto Shadowlawn, an unlit gravel road within the Pass Christian city limits. He drove up this road a short distance and stopped near the middle while Foley walked toward the side.

Meanwhile, about 10:30 or 11:00 p.m., John Hayden, a patrolman on the police force of defendant City of Pass Christian, had responded to a radio call concerning a prowler. He was near the reported location on Shadowlawn. As he drove onto this road, he turned off all the lights on his patrol car. He saw Languirand's car parked about "a hundred feet" from the residence of the person who had reported the prowler. Hayden stopped his car, got out, and turned on an overhead spotlight. Foley was moving back to the car. Hayden testified that he saw a shiny object in Foley's hands and that he shouted "stop" a number of times. Foley, however, testified that he was not carrying anything and that he heard nothing. Foley could not tell that the vehicle was a patrol car. Although Hayden testified that a flashlight was later found near the scene, this was not confirmed. He also stated that as Foley got in the car, it began to drive away and that he now saw the shiny object inside the car. Hayden testified that he was afraid because he though this object was a gun. As the car began to drive away, Hayden fired his .357 Magnum revolver at the left rear tire of the car in an effort to stop it. Though he did not recall doing so, he fired a second shot also. During this time, John Languirand was bent over adjusting his tape deck, which was playing. He heard no warnings and did not see the patrol car pull up behind him. Suddenly, the spotlight was in his rearview mirror, he heard two shots, his foot slipped

off the brake and hit the gas pedal, and the car went down the road until it veered off and struck a tree. Hayden's second shot struck Languirand in the base of the neck, which caused extremely severe permanent injuries, including partial paralysis from the chest down.

PROCEEDINGS BELOW

Languirand filed suit on May 29, 1979, against Hayden and the City of Pass Christian ("City"). The case was tried to a jury before a United States Magistrate. The jury, in a general verdict without any special issues or interrogatories, found for Hayden and against the City for $1,500,000. The City appeals the judgment on the verdict against it. Languirand does not appeal the judgment in Hayden's favor.[2] Languirand's suit against Hayden was based on the assertion that Hayden used excessive force in his attempt to stop or apprehend Languirand. However, it was not claimed that Hayden intended to shoot Languirand or anyone else. Rather, it was Langui-

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2. Languirand has cross-appealed on whether the City should have been required to pay interest on the damage award, and to post a supersedeas bond on appeal. Our resolution of the appeal makes it unnecessary to reach these issues. Nor need we address the City's other arguments: whether *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), apply retroactively; whether the action was barred by the applicable Mississippi statute of limitations; and whether the court erred in admitting evidence of the City's subsequent training policy.

rand's theory that Hayden was grossly negligent in his shooting at the car in an attempt to stop it.[3] The case

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3. Plaintiff's witness, Senator Smith, a law enforcement and firearms expert who investigated the incident in his then capacity as an assistant sheriff (he later became a state senator), testified in response to questions by plaintiff's counsel that:

> "He [Hayden] was not attempting to shoot anyone in the car. There were two shots fired. The first shot entered the lower left panel down by the tire of the car at an angle which was apparent to me that he was attempting to stop the car or was aiming at the tire. The second bullet entered above that, just a little bit to the right and entered just above the body of the car and went through the—this was a convertible car, by the way—went through the canvas and part back at the left side, left rear of the car. " . . .
>
> "I simply think he fired the gun twice in rapid succession, attempting to shoot the left rear tire of the car out, and the second shot the gun jumped on him and the bullet went through the back of the car and struck the Languirand boy.
>
> "Q. Do you think he intended to fire the second shot?
>
> "A. I think he intended to fire it, but I think he was intending to fire it at the tire, and that the gun simply rose on him.
>
> "Q. All right, sir. On the basis of your experience would you expect that a gun of that caliber, a .357 Magnum, to raise up when it was fired like that in rapid succession?
>
> "A. Yes, sir, I would."

Plaintiff's counsel took the same position in argument to the trial court ("it is the plaintiff's position that all proof adduced in this trial so far shows that there was no intent upon the part of John Hayden to shoot the plaintiff here") and jury ("I have no doubt in my mind John Hayden did not intend to hurt John Languirand"). This position might have been influenced by Hayden's reliance on the Mississippi one year statute of limitations for "assault." Miss.Code § 15-1-35. When Hayden's motion for instructed verdict, based

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against Hayden was submitted to the jury on the basis of whether he used excessive force and was grossly negligent in doing so, but the jury was also instructed to find for Hayden if he acted "in good faith with a reasonable belief under the circumstances, including his experience and training, in the validity of his conduct." The theory of the plaintiff's suit against the City was that Hayden was inadequately trained, particularly in the use of his pistol, and that the shooting of Languirand was, as this contention was phrased in the trial court's charge to the jury, "a proximate result of the alleged policy or custom of the City of Pass Christian of placing armed officers on the streets without adequate training in the use of weapons or firearms." The charge required a determination that the City was grossly negligent for a verdict to be rendered against it, but did not submit any good-faith defense with respect to the City.[4]

We reach only one issue—whether the evidence established the requisite custom or policy for which a city can be held liable under section 1983.

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in part on this statute, was argued to the trial court just prior to submission of the case to the jury, the trial court in denying the motion stated, without contradiction by any counsel, "I'll state for the record it's *not charged* here that there was intentional tort in this case, nor do I think one has been proven." (Emphasis added.)

4. We refer to the trial court's charge not for the purpose of expressing our approval or disapproval of it (no complaints of the charge are before us except one by the City which we do not reach), but merely as reflecting the theories on which the case was tried.

MUNICIPAL LIABILITY UNDER SECTION 1983

[1, 2] Since 1978 the law regarding the liability of municipalities under section 1983 has been radically changed. In that year, the Supreme Court decided *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), which overruled the holding in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that cities were not among the "persons" subject to suit under section 1983. The Court held that municipalities "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690, 98 S.Ct. at 2035. Moreover, a city can be sued "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690-91, 98 S.Ct. at 2035-36. With respect to custom, *Monell* quoted with approval the language of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970), that "practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Monell*, 436 U.S. at 691, 98 S.Ct. at 2036 (footnote omitted).[5] However, *Monell*,

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5. In the portion of *Adickes* just prior to that quoted in *Monell*, the Court stated, " . . . we think it clear that a 'custom, or usage, of [a] State,' for purposes of § 1983, must have the force of law by virtue of the persistent practices of state officials." *Adickes* 398 U.S. at 167, 90 S.Ct. at 1613.

ruled that "Congress did not intend municipalities be held liable unless action pursuant to official municipal policy of some sort caused a constitutional tort" and that "a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.* at 691, 98 S.Ct. at 2036. As the Court stated, "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694, 98 S.Ct. at 2037.

The Court in *Monell* did not address all the possible variations and permutations of section 1983 actions against municipalities. In *Monroe v. Pape*, the Court had observed that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187, 81 S.Ct. at 484. However, *Monell* does distinguish between ordinary tort liability and the liability of governmental units under section 1983 in its holding that respondeat superior is not available in the latter situation. Moreover, in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the Court also distinguished between section 1983 actions against individuals and those against municipalities by denying the latter a good faith immunity. A distinction was also made between the section 1983 liability of governmental units and individuals in *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) where it was held that the former were not subject to punitive damages, though the latter were.

A footnote in the *Monell* opinion, in rejecting the argument for respondeat superior liability based on the contention that "liability follows the right to control the actions of a tortfeasor," states that "[b]y our decision in *Rizzo v. Goode*, [423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976)], we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." *Id.* 436 U.S. at 694 n. 58, 98 S.Ct. at 2037 n. 58. In contrast to *Monell, Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), was not an action against a municipality, but rather against the individuals who were the mayor, city managing director, police commissioner, and other police supervisors of Philadelphia,[6] seeking injunctive relief under

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6. Similarly, *Parratt* v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), in which the Supreme Court, in an opinion by Justice Rehnquist, indicated that negligent deprivation of property by governmental officials in the course of their duties might subject such individuals to suit under section 1983 if the plaintiff had no adequate state law remedies, did not concern the liability of governmental units as *such*. However, *Parratt* unlike *Rizzo* in this respect, did not focus on the nature of the required nexus between the loss and the defendants' dereliction, or on how that might be affected by the character of the dereliction, but rather merely assumed a sufficient nexus in the case before it and went on to hold that in any event there was no cause of action because state law remedies were adequate. For these reasons, we do not consider that *Parratt* speaks directly to the issues we consider in the case at bar.

Further, it is difficult for us to discern from *Parratt* an overall pattern of section 1983 jurisprudence such as to throw meaningful light on the particular problems we seek to resolve here. We note that in a sense *Parratt* seems to potentially expand section 1983's reach, by its discussion of neg-

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section 1983 on account of diverse incidents in which city police officers had, in the course of their duties, deprived

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ligent deprivations. On the other hand, not only does it focus seem to be on procedural (rather than substantive) due process, but it heavily relies on the impropriety of "turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983" so that "any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983." *Id.* at 544, 101 S.Ct. at 1917. The latter language is strongly reminiscent of the suggestion in *Paul v. Davis*, 424 U.S. 693, 698, 96 S.Ct. 1155, 1159, 47 L.Ed.2d 405 (1976), also authored by Justice Rehnquist, that "survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle" would not have claims under section 1983. We also note that the observation in Justice Powell's concurring opinion in *Parratt*, "arguably, if the absence of a tort remedy is the heart of one's constitutional claim, the defendant in the § 1983 suit must be the State itself, or its lawmakers, both of whom are immune from suit," *id.* at 550 n. 8, 101 S.Ct. at 1921 n. 8, is not addressed by the *Parratt* majority.

We have not found *Parratt* to impose liability on a municipality under section 1983 in all cases of injury caused by the municipality's negligence, even where the state law remedy may be inadequate. *See Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir. 1982) (alleged failure, even if intentional, of municipality to enforce speed limit and erect needed traffic control device at dangerous crossing, resulting in serious accident, does not state section 1983 claim against municipality, even if state law remedy were inadequate).

Parratt may well become a key to the weaving of an overall seamless web of section 1983 jurisprudence. The creation of such an overall pattern, however, is beyond our competence as an inferior court, and we are unable at this time to discern all the permutations of its likely eventual development by the Supreme Court.

We note that Hayden apparently had no qualified immunity under Mississippi law. *See Holland v. Martin*, 214 Miss. 1, 56 So.2d 398 (1952).

various individual city residents of their constitutional rights. Approximately twenty such specific incidents were found by the trial court to have occurred during the preceding year, *id.* at 367-68, 96 S.Ct. at 602, which the Supreme Court noted, though found to reflect a "statistical pattern," was also found to be "'fairly typical of . . . police departments in major urban areas.'" *Id.* at 375, 96 S.Ct. at 606. The Supreme Court, reversing the district court and Court of Appeals, held that there was no evidence to support a claim under section 1983 against the defendants. So far as we can determine, Justice Rehnquist's opinion for the Court in *Rizzo* makes no reference to failure to supervise or to the possibility of liability, or deficiencies in proof, in that or any similar respect. Rather, the thrust of the opinion seems to be that the defendants were not shown to have done anything *affirmative* to bring about the complained of wrongs. Justice Rehnquist observed that "there was no *affirmative* link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct." *Id.* at 371, 96 S.Ct. at 604 (emphasis added). The opinion expressly rejects the plaintiffs' contention that "petitioners' *failure* to act . . . is indistinguishable from the active conduct enjoined in" other cases, *id.* at 376, 96 S.Ct. at 606, and relies on the district court's finding "that the responsible authorities had played no *affirmative* part in depriving any members of the two respondent classes of any constitutional rights." *Id.* at 377, 96 S.Ct. at 607 (emphasis added).

In *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), the Court described *Monell* as hav-

ing "held that official policy must be 'the moving force of the constitutional violation' in order to establish the liability of a governmental body under § 1983" and then cited *Rizzo* for the proposition that a "general allegation of administrative negligence fails to state a constitutional claim cognizable under § 1983." *Id.* at 326, 102 S.Ct. 454.

Our research discloses no decision of the Supreme Court, or of this Court, which has made any holding, or given authoritative direction, on the issue of the liability under section 1983 of a governmental unit for injuries resulting from the lack of adequate training of its personnel. In *Berry v. McLemore*, 670 F.2d 30 (5th Cir.1982), we were faced with a section 1983 suit against a municipality based on injuries directly caused by the intentional misconduct of its chief of police. We observed that

> ". . . some courts interpreting *Monell* have held that a municipal policy of authorizing or encouraging police misconduct can be inferred where the municipality has been *grossly negligent* in the hiring, training, or disciplining of its *police force*. *See, e.g., Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir.1981); *Owens v. Haas*, 601 F.2d 1242, 1246-47 (2d Cir.), *cert. denied*, [444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979)]; *Popow v. City of Margate*, 476 F.Supp. 1237, 1245-46 (D.N.J. 1979); *Leite v. City of Providence*, 463 F. Supp. 585, 590-91 (D.R.I.1978); *see also Reeves v. City of Jackson*, 608 F.2d 644, 652 (5th Cir.1979) (dictum)." *Id.* at 32-33 (emphasis added).

We described that interpretation as "this most expansive view of *Monell*" and "expressly decline[d] to rule on whether this interpretation of *Monell* is proper." *Id.* at 33 & n. 1. Such a ruling was not necessary because we found no evidence that the city's governing body was negligent in hiring or failing to train the police chief and be-

cause, with respect to the municipality's failure to discipline the police chief, "a municipal policy of authorizing or encouraging police misconduct . . . cannot be inferred from a municipality's isolated decision not to discipline a single officer for a single incident of illegality." *Id.* at 33.

Other decisions of this Court, though not dealing with the issue of failure to train, have nevertheless emphasized the requirement that the wrongful act be taken pursuant to the municipality's custom or policy in order for the municipality to be liable under section 1983. *See Brewer v. Blackwell*, 692 F.2d 387, 400-01 (5th Cir.1982) (police chief's insistence that prisoner sign hold harmless agreement before release from jail not shown to be pursuant to any municipal policy or custom to require such agreements); *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1323 & n. 3 (5th Cir.1980) (allegedly malicious warrrantless arrest without probable cause does not give rise to municipal liability under section 1983 where there is no evidence "there existed a municipal policy or custom that, when carried out, inflicted the injury," and such a policy is not adequately shown by testimony that investigation in question "would meet the standards required by the [city] Police Department"). On the other hand, where the offending action carries out a municipal policy or custom, we have found municipal liability under section 1983. *See Garris v. Rowland*, 678 F.2d 1264, 1274-75 (5th Cir.), *cert. denied sub nom. City of Fort Worth v. Garris*, — U.S. —, 103 S.Ct. 143, 74 L.Ed.2d 121 (1982) (arrest in question was pursuant to "the procedure of the police department" to carry out an arrest on a valid warrant without further investigation "even though further investigation to deter-

mine if sufficient facts existed to formally file a charge against the arrestee was contemplated").

Though not involving the liability of a governmental unit as such, we believe this Court's opinion in *Wanger v. Bonner,* 621 F.2d 675 (5th Cir.1980), aptly illustrates some of the foregoing principles. There, the defendant sheriff, Bonner, was held individually liable under section 1983 for the actions of his deputies in searching throughout the Wangers' residence in connection with a middle-of-the-night attempt to serve an out-of-county arrest warrant specifying the address of the Wangers' house as that of Payne, the party named in the warrant. In fact, Payne was not present and apparently had never had any connection with the Wangers or that address, where the Wangers had lived for three years. No attempt was made to check the accuracy of the address information on the warrant, either before proceeding to the residence or following the Wangers' protest and production of identification when the deputies arrived and announced their purpose. Instead, the deputies simply proceeded to make a thorough search. Despite the fact that frequently as many as one fourth or one fifth of the warrants served would have incorrect addresses, it was the policy of the sheriff's office that "no attempt was made to verify the correctness of addresses on warrants received from other counties prior to attempting to serve them" and "the standard instructions from the Sheriff's Department were always to search the premises when informed that the person named in the warrant was not present at the address listed on the warrant" even though there was no information, other than the listing on the warrant, that the address was correct and no attempt had been made to verify it. *Id.* at 679-

80. In the incident in question, the deputies were acting pursuant to these policies. This Court's opinion commented that the defendant sheriff's "*failure* to adopt policies to prevent constitutional violations . . . [w]ould *not* be an adequate basis for [his] liability under § 1983," but affirmed a judgment against the sheriff because "his liability was based upon *affirmative* policies that he acknowledged adopting concerning the manner in which arrest warrants were to be served . . . that . . . had precipitated the alleged unconstitutional actions of his deputies." *Id.* at 680-81 (emphasis added).

This rationale was followed in *Reimer v. Smith*, 663 F.2d 1316 (5th Cir.1981), in upholding the dismissal of a section 1983 complaint against a Texas Ranger captain grounded on the actions of his subordinates, it being alleged that "as their superior officer" he "was negligent in his failure to supervise them." *Id.* at 1323. The *Reimer* opinion observes: "In *Wanger* . . . we stated that a supervisory official could not be held liable for failing to adopt policies to prevent constitutional violations . . . ." *Id. See also Vela v. White*, 703 F.2d 147, 153 (5th Cir.1983).

We will not attempt a review of the numerous decisions in other Circuits touching on these points. As might well be expected, they are not entirely harmonious. Some of these decisions, while allowing section 1983 recovery against a municipality for failure to properly train and discipline police officers, nevertheless apparently require that this be an essentially systemic failure resulting in a pattern of police misconduct. *See, e.g., Herrera v. Val-*

entine, 653 F.2d 1220 (8th Cir.1981).[7] *See also McClelland v. Facteau*, 610 F.2d 693, 697 (10th Cir.1979) ("must show that the defendant was adequately put on notice of prior misbehavior"). Such a requirement would appear to be consistent with the general rule as to the requirement of proof of custom or policy. *See Powe v. City of Chicago*, 664 F.2d 639, 649-52 (7th Cir.1981). Other decisions, however, indicate that "citizens do not have to endure a 'pattern' of past police misconduct before they can sue the city under section 1983," and that recovery may be had

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7. In *Herrera*, plaintiff sued the city under section 1983 for the beating intentionally inflicted upon her by its police officers, claiming "that the City's failure to properly hire, train, retain, supervise, discipline and control" the officers "*directly* caused her tortious injury." *Id.* at 1224. The Court observed that "[i]n order to prove her case" plaintiff "had to establish that the City had notice of prior misbehavior and that its failure to act upon such knowledge caused her injury." *Id.* The Court indicated its approval of the rule that where " 'senior personnel have knowledge of a pattern of constitutionally offensive acts by their subordinates but fail to take remedial steps, the municipality may be held liable for a subsequent violation if the superior's inaction amounts to deliberate indifference or to tacit authorization of the offensive acts.' " *Id.*, quoting from *Turpin v. Mailet*, 619 F.2d 196, 201 (2nd Cir.), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980). *Herrera* went on to note that a municipality could be liable if it "fails to train its *police force*" and that "a municipality's continuing failure to remedy known unconstitutional conduct of its police officers is the type of informal policy or custom that is amenable to suit under section 1983." *Id.* at 1224 (emphasis added). In sustaining recovery against the city, the Court observed that it was "adequately notified" (by numerous prior incidents, including one hearing at which "nearly forty separate complaints of police misconduct" were made) that its "police force needed close and continuing supervision. It, however, permitted its overzealous *police force* to *continue* its overlording. The inevitable result was the kind of misconduct that caused [plaintiff's] physical beating . . . ." *Id.* at 1225 (emphasis added).

for injury that "results from the complete lack of training or grossly inadequate training of a *police force*" provided such is "the result of a deliberate and conscious indifference by the city." *Leite v. City of Providence*, 463 F.Supp. 585, 590-91 (D.R.I.1978) (emphasis added). *See also Hays v. Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 75, 74 L.Ed.2d 73 (1982). *But see id.* at 876-78 (dissenting opinions). Still others may indicate that recovery on such a theory may be had against a municipality on the basis of a single incident and without proof of a general failure to train. *See Owens v. Haas*, 601 F.2d 1242, 1246-47 (2d Cir.), *cert. denied*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979). *But see Popow v. City of Margate*, 476 F.Supp. 1237, 1246-47 (D.N.J. 1979).

[3] We also observe that it is well settled that a municipality may be liable under section 1983 for the intentional conduct of its governing body, even though such conduct is an *ad hoc*, isolated, individual action not taken pursuant to any overall municipal custom or policy. *See, e.g., Newport v. Facts Concerts, Inc., supra* (city council); *Owen v. City of Independence, supra* (city council); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir.1980) (school district board of trustees). This is also true regarding deprivations directly caused by the intentional actions of individual officials respecting a subject matter where they have the legal "final authority," and are the "ultimate repository of . . . power," of the governmental unit in question. *Familias Unidas*, 619 F.2d at 404. But we have held city police chiefs *not* to be such officials, even as to their intentional actions, as they are almost uniformly subordinate to the city's governing body. *Brewer v. Blackwell*, 692

F.2d at 401; *Berry v. McLemore, supra. Cf. Bennett v. City of Slidell,* 697 F.2d 657, 661 (5th Cir.), *rehearing granted,* 706 F.2d 533 (5th Cir.1983) (deprivation *directly* caused by *intentional* acts of city building inspector and city attorney).

[4] We conclude that if there is a cause of action under section 1983 for failure to properly train a police officer whose negligent or grossly negligent performance of duty has injured a citizen, that such failure to train must constitute gross negligence amounting to conscious indifference, and that a municipality is not liable under section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force. Viewing the evidence against this standard, and in the light required by *Boeing Company v. Shipman,* 411 F.2d 365, 374-75 (5th Cir.1969), we find it insufficient to make out a *prima facie* case of section 1983 liability against the City. Hence, we hold that the trial court erred in failing to grant the City's motions for directed verdict and for judgment n.o.v.

EVIDENCE CONCERNING THE CITY'S LIABILITY

[5] Hayden was hired by the City's police department as a dispatcher in January 1974. He had graduated from high school in 1971, and before his employment with the police department had successfully completed a two-

year junior college course in which he was awarded an Associate Degree in Law Enforcement. This course, however, did not include field training or actual practice in the use of weapons. Hayden's twenty-first birthday was in March 1974. In August 1974, he passed, with a score of 81, a civil service examination and was made a patrolman (though the evidence is unclear, it appears Hayden also took and passed a civil service examination before becoming a dispatcher). The examination was prepared and administered by the City's civil service commission.

Hayden was scheduled to attend the Mississippi Law Enforcement Officers' Academy for an eight-week law enforcement training course, including weapons firing, beginning in September 1974. However, he was married on August 30, and pursuant to his request, was allowed to postpone his attendance at the Academy.

There is nothing to suggest that prior to the incident in question Hayden's performance of duty was in any way deficient, or that anything in it, or otherwise in his past, reflected adversely on him.

The evidence was conflicting as to the extent of Hayden's training and ability to use his revolver. Hayden testified he shot on his own in the woods and at a target range, and was able to hit what he was aiming at. Gerald Peralta, who was the City's chief of police from 1969 until August or September 1974, testified that he required new officers to qualify on the firing range before being allowed to carry a weapon, and that he assumed, though he could not specifically recall, that Hayden did so.[8] However, Hay-

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8. Hayden and Peralta's son were friends, and Hayden had frequently visited in the Peralta home. Hayden was apparently something of a protege of Peralta.

den admitted that he had not received formal training in the use of his weapon, and the jury was free to find that he had not qualified and that his testimony as to the extent of personal practice and skill in the use of the weapon was exaggerated. While Peralta and Johnson, the assistant police chief who became acting chief on Peralta's departure, each expressed the opinion that Hayden was fully competent to handle his patrolman job, the jury was free to find otherwise, particularly considering the testimony of Senator Smith, based on his investigation of the incident (*see* note 3, *supra*), that at the time in question Hayden had not "had the minimum training that was necessary for him to do his job."

Hayden, having been suspended on account of the accident, "resigned" two days after its occurrence. The investigation of the incident was conducted by the sheriff's department, partially at the request of the new police chief, Edward Alley, who had commenced his employment with the City on the morning of December 2, 1974. Alley shortly thereafter instituted a policy that "every police officer riding in a squad car has to go to police academy [the Mississippi Law Enforcement Officers' Academy] before he gets in the car."[9]

There is simply no evidence that the City, or its police force, had any policy or custom of resort to weapons, or other employment of significant force, in circumstances which might be deemed improper, unnecessary, or dangerous. There was no evidence of any other incident which involved, or which anyone claimed involved, police mis-

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9. This evidence was admitted only so far as it might show the feasibility of such a procedure. See Fed.R.Evid. 407.

conduct or even any simple negligence on the part of the police. Apart from the incident in question, there was no evidence that any police officer had ever acted, or was claimed to have acted, in an improper or negligent manner, or even that any citizen had been injured, or exposed to risk of injury, in *any* incident involving the police. There was no evidence that anyone on the police force, other than Hayden, lacked sufficient skill, training, and experience to be qualified for and able to adequately perform the position he or she held.[10] There is simply no evidence that the City had any policy or custom of placing armed officers on the streets who lacked adequate training, skill, and experience in the use of firearms.

Of course, if the City had had in force the policy that Chief Alley subsequently promulgated, and which Smith testified he believed all cities should have, Hayden would not have gone on patrol without having first attended the Academy. But under the evidence here, this failure to have earlier adopted an Alley-type policy cannot be con-

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10. Peralta testified that Hayden was the only one on the force who had not successfully completed the Mississippi Law Enforcement Officers' Academy course. Senator Smith stated there were then some (unspecified) other officers on the City's force who had not been to the Academy, but a fair reading of his testimony as a whole indicates this was not so much stated on personal knowledge as it was a statement that he did not know the officers had been or was informed they had not. Even assuming this testimony was on personal knowledge, however, in any event it is plain that Smith never testified (nor did any other witness) that there were *any* officers (identified or not) on the force, other than Hayden, who were inadequately trained or lacked the necessary skills and experience to be qualified for the position, or that the force in general lacked the necessary skills, experience, or training. Obviously, the Mississippi Academy is not the only place a police officer can receive adequate training.

verted into *having* a policy of *placing* incapable police officers on patrol. There is simply no showing that such was the case. Whatever policies the City may have failed to adopt respecting training, there is no showing that any of its officers, other than Hayden, were not adequately equipped, by training, experience, and ability, to competently perform their jobs. What we are dealing with here, so far as this record discloses, is one isolated incident in which the police chief negligently, or grossly negligently, allowed one particular inadequate officer to go on patrol, and this officer's inadequacies resulted in one particular incident of negligent or grossly negligent injury to a citizen. Grievous and regrettable as that incident and injury indisputably are, that does not convert this case to one of municipal policy or custom under section 1983.

Nor does the evidence here warrant a finding that the City's governing body was itself grossly negligent in allowing Hayden to go on patrol without adequate training or experience. These were matters which were handled by the police chief, and both occupants of that position during the time in question thought that Hayden was capable of doing his job. Steven Saucier, the mayor during this period, testified at trial, "Not that I know of," when asked, "Had Mr. Hayden had any formal weapons training that you know of prior to December 2, 1974?" Saucier also testified that he did not know what experience Hayden had shooting a .357 Magnum pistol or what Hayden learned in this law enforcement education course at the junior college. Under the evidence here, this testimony is insufficient to support a finding that the members of the City's governing body were themselves grossly negligent, or consciously indifferent to the welfare of the citizens, in failing to pre-

vent Hayden from going on patrol without further training. There is no evidence that they knew or believed he was likely incapable of doing the job, or that they had compelling cause or occasion to question the judgment of the chief or acting chief.

CONCLUSION

Certainly, there is evidence from which the jury could reasonably conclude that Hayden was grossly negligent on the occasion in question and, arguably, that the City police chief was grossly negligent in sending Hayden on patrol without additional training. However, because there was no evidence that the City police force in general was inadequately skilled or experienced, that there had been any other actual or claimed incidents of police misconduct or negligence, that the City had any general policy or custom of sending unskilled or inexperienced officers on patrol, or that the members of the City's governing body were themselves grossly negligent in failing to prevent Hayden's going on patrol without additional training, we hold that there has been an insufficient showing to authorize imposition of section 1983 liability on the City itself. We accordingly reverse the judgment below against the City.

REVERSED.

GOLDBERG, Circuit Judge, specially concurring.

I concur in the result.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4329

JOHN LANGUIRAND,

Plaintiff-Appellee
Cross-Appellant,

versus

JOHN HAYDEN, An Individual,

Defendant,

CITY OF PASS CHRISTIAN, Etc.,

Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC
(Filed November 30, 1983)

(Opinion 10/17/83, 5 Cir., 198__, — F.2d —)

(November 30, 1983)

Before GOLDBERG, WILLIAMS and GARWOOD, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

/s/ Will Garwood
United States Circuit Judge

REHG-8

No. 83-1407

In The
Supreme Court of the United States
October Term, 1983

JOHN LANGUIRAND,

Petitioner,

vs.

CITY OF PASS CHRISTIAN,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE

A.

Since there was no policy or custom adopted by the city connecting the accidental shooting there can be no liability of the city under § 1983.

Policy or Custom

(1) The Fifth Circuit's Opinion reflects an exhaustive examination of the trial record, searching and sifting

for shards or fragments of evidence which might furnish a basis for a factual determination that Petitioner's accidental injury was a result of policy or custom adopted by the City. Finding none, it reversed and rendered.

The essence of the Fifth Circuit's Opinion, we believe is as follows:

> (App. P.26—Opinion) *Supra,*
>
> What we are dealing with here, so far as this record discloses, is one isolated incident in which the police chief negligently, or grossly negligently, allowed one particular inadequate officer to go on patrol, and this officer's inadequacies resulted in one particular incident of negligent or grossly negligent injury to a citizen. Grevious and regrettable as that incident and injury indisputably are, that does not convert this case to one of municipal policy or custom under section 1983.

Petitioner misread the Fifth Circuit Opinion to require the Plaintiff to prove the entire police force was inadequately trained. What the Panel Decision held was that even if Hayden and the chief of police were grossly negligent, there was no nexus between the negligence and policy or custom. The foundation for the 1983 cause of action against the City is a policy or custom. To hold the City liable without that nexus is to impose liability based upon *respondeat superior,* which cannot be done. *Monell v. Department of Social Services of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978).

Ultra Vires

(2) At Pages 6 and 7 of the Petition, Petitioner addresses the subject of the Pass Christian Civil Service Commission in the context of policy or custom. This is a

totally new subject never even hinted at in the lower courts. The Civil Service Commission simply tested Hayden along with other applicants and certified to the appointing authority that he was eligible for employment. The Commission did not "hire" Hayden. Section 21-31-1 *et seq.*, MISS CODE ANN. (1972).

Smith v. Wade

(3) Petitioner seems to argue that *Smith v. Wade*[1] diminishes the Plaintiff's burden of proof in 1983 cases. The citation from *Smith*, at Page 8 of the Petition, is in the context of punitive damages. *Smith* does not change *Monell's* prohibition of recovery on the theory of *respondeat superior*. It simply holds that "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifferernce to the federally protected rights of others . . ." punitive damages may be awarded in a 1983 case.

B.

There is no conflict in the circuits.

While the Panel's decision held that the decisions from the other Circuits were not "harmonious", it did not expressly find a conflict among the Circuits, nor did it decline to align the Fifth Circuit with any other Circuits. A careful reading of the cases from other Circuits cited and discussed by the Fifth Circuit, at Pages 19 to 21 of the appendix, reveals that in all but one of the cited cases, the courts were dealing with dismissal on the pleadings or on summary judgments rendered for defendants or errors in instructions.

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[1] — U.S. —, — S.Ct. —, 75 L.Ed. 2d 632 (April 20, 1983)

1. *McClelland v. Facteau,* 610 F.2d 693 (10th 1979), Summary Judgment was granted to two police chiefs who (1) did not participate in the alleged deprivation of Plaintiff's constitutional rights and, (2) as to Plaintiff's contention that the chiefs did not properly supervise their subordinates. On appeal, Summary Judgment was affirmed as to the first contention and reversed as to the second, because there were genuine issues raised below when Plaintiff introduced newspaper articles and affidavits indicating that it was a well known fact that rights were being violated. The Court said "distant rumors that are too vague to prompt action by reasonable persons, or information that is reasonably believed to lack credibility do not provide sufficient notice." (Citation omitted). However, Plaintiff's showing was adequate to survive Summary Judgment, and on that issue the case was remanded.

2. In *Owens v. Haas,* 601 F.2d 1242 (2nd 1979), *cert. denied,* 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed. 2d 407 (1979), Owens' 1983 Complaint was dismissed on the pleadings. Reversing, the Court held "Owens should have been allowed limited discovery and opportunity to amend his complaint to plead facts to support a legitimate § 1983 claim . . ." *Supra* 1251.

3. *Hayes v. Jefferson County,* 668 F.2d 869 (6th 1982), *cert. denied,* — U.S. — 103 S.Ct. 75, 74 L.Ed. 2d 73 (1982), the Court of Appeals reversed a 1983 action because the Trial Court's instruction was based on simple negligence. The Court noted "the case law has limited § 1983 so as not to reach isolated instances where negligent failure to adequately supervise, train, or control was involved . . ." (Citation omitted).

4. *Popow v. City of Margate,* 476 F.Supp. 1237 (D.N.J. 1979), the District Court denied Summary Judgment to the City of Margate, (in a cause of action brought by the widow of an innocent bystander killed by a policeman pursuing a suspect). The District Court discussed facts and inferences which might establish a policy or custom without deciding the case on the merits, and without deciding whether the evidence established the necessary policy or custom.

5. In *Powe v. City of Chicago,* 664 F.2d 639 (7th 1981), Powe was robbed and his identification stolen. Afterwards, the police force records indicated that Andrew Powe should be detained if arrested. He was arrested improperly on four occasions. The District Court granted Summary Judgment for the City of Chicago and Cooke County. On appeal, the 9th Circuit held that Powe had alleged sufficient facts to raise an inference that the City's procedures were deficient to the extent that an innocent man was arrested on four occasions and remanded the case back to the District Court for trial.

6. *Monell* was decided on June 9, 1978. On December 21, 1978, Chief District Judge Pettine decided *Leite v. City of Providence,* 463 F.Supp. 585 (D.C.R.I. 1978) on the City's Motion to Dismiss the Complaint. The Court concluded that "Plaintiff in this case does not allege the requisite intentional conduct, or recklessness, or gross negligence necessary to state a claim against a municipality under section 1983", dismissed the Plaintiff's claim without prejudice and gave Plaintiff thirty days to amend his Complaint. *Leite* is another instance of judgment on the pleadings, not on the merits.

7. In the only case cited by the Fifth Circuit and discussed in this response that went to trial on the merits, *Herrera v. Valentine,* 653 F.2d 1220 (8th 1981), the Court of Appeals for the 8th Circuit used the "deliberate indifference" tests to conclude that a female native Indian, who suffered severe personal injuries at the hands of a policeman hired by the City of Gordon, Nebraska, was only one of many Indians who had similar complaints against the police department. A hearing concerning Indian complaints against the police developed nearly forty separate complaints of police misconduct, which were submitted to the Mayor of Gordon. The entire City Council was given a summary of the complaints, and the Plaintiff's participation was publicized in the local newspapers. No action was taken by the City Council, the Court said "[The City] permitted its overzealous police force to continue its overlording". *Supra,* 1225, and affirmed the award of damages made to her.

Languirand is clearly distinguishable from the facts in *Herrera.* Nothing remotely resembling the Indians' complaints in *Herrera* was directed to the City Council of Pass Christian. Neither the Fifth Circuit nor the Petitioner has demonstrated a split in the circuits. Petitioner contends that there is a conflict, but devotes two-thirds of his argument under that heading to *Smith v. Wade* and none to the conflict. We submit that Petitioner has failed to "present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding . . ."[2] of the alleged conflict among the circuits and for that reason alone, the petition should be denied.

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[2]Rules of Supreme Court of the U.S., 21.5

CONCLUSION

Respondent submits that the Fifth Circuit correctly applied *Monell*. Its decision is in accord with the circuits, and the § 1983 decisions of this Court.

RESPECTFULLY SUBMITTED this the 7th day of May, 1984.

CITY OF PASS CHRISTIAN

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